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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: AUG 28 2007

EAC 05 062 52778

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed a subsequent appeal. The matter is now before the AAO on a motion to reopen. The motion will be granted, the previous decision of the AAO will be affirmed and the petition will be denied.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a mechanical engineer. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner reiterated his experience, proposals, job offers, linguistic abilities, education and work experience. The AAO noted:

> The issue is not whether or not the petitioner has skills that make him desirable to U.S. employers. Rather, the issue in contention is whether or not the petitioner offers a prospective national benefit to the United States that is of such unusual magnitude (compared to other professionals with advanced degrees) that it is in the national interest to waive the job offer/labor certification requirement that, by law, normally attaches to the classification the petitioner has chosen to seek.

The AAO then concluded that the petitioner had not demonstrated that his efforts had already proven effective or had otherwise attracted significant attention beyond his own circle of collaborators and acquaintances.

According to 8 C.F.R. § 103.5(a)(2), a motion to reopen must state the new facts to be provided and be supported by affidavits or other documentary evidence. On motion, the petitioner fails to contest any of the factual or legal conclusions in the AAO's decision. Rather, the petitioner relies on his recent attainment of a job with Xerox. The petitioner submits letters from [redacted] the technical recruitment manager at Xerox, and [redacted] an engineer and technical consultant in Oregon who claims to manage his own research and manufacturing company in Russia. The petitioner has provided new facts and, thus, has submitted a proper motion. Nevertheless, the petitioner must still demonstrate his eligibility as of the date the petition was filed. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). Thus, any new evidence submitted on motion must relate to the petitioner's eligibility as of that date. For the reasons discussed below, we find that the petitioner has not overcome the AAO's concerns and, therefore, we affirm the AAO's previous decision.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens who are members of the professions holding advanced degrees or aliens of exceptional ability. --

> (A) In general. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
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> (B) Waiver of job offer.
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus an alien employment certification, is in the national interest.

Neither the statute nor pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of the phrase, "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

A supplementary notice regarding the regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states, in pertinent part:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dep't of Transp., 22 I&N Dec. 215, 217-18 (Comm. 1998)[hereinafter "NYSDOT"], has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, it must be shown that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

Neither the director nor the AAO contested that the petitioner works in an area of intrinsic merit, engineering. While the director questioned whether the proposed benefits of the petitioner's employment would be national in scope, the AAO accepted that at least one of the proposed benefits would be national in scope. On Part 6 of the petition, the petitioner indicated that the proposed employment was as an "engineer-mechanic." The nontechnical job description is "Building and road machines and equipment, constructing and driving of highways." In response to the director's request for additional evidence, the petitioner discussed his experience in both engineering and management. He provided letters attesting to his proposed filter to reduce fuel consumption and emissions and import/export proposals. Clearly, reducing fuel consumption and emissions would be national in scope. On motion, however, the petitioner indicates that he is working for Xerox. While the technical consultant supporting the appeal, [redacted] still asserts that the petitioner's filter is "[a]mong the most promising devices," neither the petitioner nor [redacted] of Xerox explain how the petitioner will promote this filter while working at Xerox or provide any other benefits that are national in scope.

It remains, then, to determine whether the petitioner will benefit the national interest to a greater extent than an available U.S. worker with the same minimum qualifications. Eligibility for the waiver must rest with the alien's own qualifications rather than with the position sought. In other words, we generally do not accept the argument that a given project is so important that any alien qualified to work on this project must also qualify for a national interest waiver. *Id.* at 218. Moreover, it cannot suffice to state that the alien possesses useful skills, or a "unique background." *Id.* at 221. Special or unusual knowledge or training does not inherently meet the national interest threshold. The issue of whether similarly-trained workers are available in the United States is an issue under the jurisdiction of the Department of Labor. *Id.*

At issue is whether this petitioner's contributions in the field are of such unusual significance that the petitioner merits the special benefit of a national interest waiver, over and above the visa classification he seeks. By seeking an extra benefit, the petitioner assumes an extra burden of proof. A petitioner must demonstrate a past history of achievement with some degree of influence on the field as a whole. *Id.* at 219, n. 6. In evaluating the petitioner's achievements, we note that original innovation, such as demonstrated by a patent, is insufficient by itself. Whether the specific innovation serves the national interest must be decided on a case-by-case basis. *Id.* at 221, n. 7.

As noted by the AAO, the petitioner's initial submission consists largely of documentation of his credentials as an engineer, such as copies of educational transcripts and professional certificates. The petitioner also submitted employment letters one of which, as noted by the AAO, was

inconsistent with other evidence of record. Specifically, [redacted] General Manager of [redacted] stated, in a June 2004 letter that the petitioner "is employed by our company since 02/10/1999" but was on a leave of absence for emergency medical treatment. As noted by the AAO, however, [redacted] General Manager of Fedco Metals Industries asserts that the petitioner worked there from August 2001 to June 2003 and the petitioner had already arrived in the United States in December 2003, five months before the date of [redacted] letter. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). The petitioner does not address these inconsistencies on motion.

As the initial submission only established the petitioner's qualifications as an engineer, the director requested additional evidence relating to the standard for waiving the alien employment certification set forth in *NYSDOT*, 22 I&N Dec. at 217-18. In response, the petitioner stated:

> I am considering that there are several reasons for underlining the importance of me, as [a] qualified person for [the] NIW. Let me list a few of them:
>
> - I have great experience in both . . . Engineering and in Management
> - I have a lot [of] proposal[s] from American companies and former [S]oviet republic's companies about [pro]spective partnership[s]
> - I have two specific job offers from American Employers
> - I am four language speaking person (Lithuanian, Russian, Hebrew and English) that is very important in highly populated area by immigrants
> - I am holder of Master Degree in Mechanical Engineering
> - I have 10 years of successful[l] . . . experience in Engineering and in Business
> - I have the inventive cast of mind and a several successfully implanted invention [*sic*]

The petitioner stated that he planned, at first, "to earn good experience" with an "appropriate American company," and then to establish his own company. The petitioner submitted letters from several individuals who have worked with the petitioner in the past or who wish to work with him in the future. None of the letters discussed the petitioner's past history of accomplishments. Rather, they speculate as to the petitioner's future potential.

The director denied the petition, concluding that the petitioner had not established that he had developed widely adopted technology or was otherwise influential.

On appeal, the petitioner asserted that he had "submitted [a] lot of proposals and business offers from U.S. or Eastern European Companies," and that these letters serve as "proof of my qualification and the proof of unusually high demand of my skills and experience for both U.S. and Eastern European market." The petitioner also cited his "education level." Finally, the petitioner discussed his job prospects.

The AAO concluded that simply demonstrating that the petitioner was employable and had experience with specific regions of the world did not "rise to the level of national interest." The AAO also noted that the classification sought was as a member of the professions holding an advanced degree and concluded that merely possessing the required education was insufficient to warrant the extra benefit of waiving the alien employment certification.

While the AAO acknowledged that increasing fuel efficiency and reducing emissions is in the national interest, the AAO concluded that simply working in this area was insufficient to warrant a waiver of the alien employment certification in the national interest. The AAO further concurred with the director that the petitioner had not shown that his efforts in this area had already had demonstrated effects, or had otherwise attracted significant attention beyond the petitioner's own circle of collaborators and acquaintances.

On motion, the petitioner submits another letter speculating as to the potential for the petitioner's filter and evidence that he is employed at Xerox. None of this evidence overcomes the basis of both the director's denial and the AAO's decision, that the petitioner has not demonstrated that this filter, or any other invention or technique developed by the petitioner, had already proven influential as of the date of filing. [redacted] does not assert that the petitioner has any skills or abilities that cannot be articulated on an application for alien employment certification.

As stated in the AAO's previous decision, the petitioner has shown that he is an experienced mechanical engineer who has also demonstrated aptitude in business. While he has been able to provide some specific information about particular projects he has undertaken, he has not shown that these activities distinguish him from other engineers/businessmen to such an extent that he qualifies for the special additional benefit of a national interest waiver, over and above the underlying immigrant classification of a member of the professions holding an advanced degree. The fact that the petitioner has now secured employment with a prestigious employer does not change the AAO's initial analysis.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the previous decision of the AAO will be affirmed, and the petition will be denied.

ORDER: The AAO's decision of April 19, 2006 is affirmed. The petition is denied.